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7 GEORGE BARICH, et al.,
8 Plaintiffs,
9 v.
10 CITY OF COTATI, et al.,
11 Defendants.

Case No. [21-cv-00034-EMC](#)

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**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS, STRIKE, AND
FOR A MORE DEFINITE
STATEMENT**

Docket No. 26

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23 Plaintiffs George E. Barich and Laurie Alderman sued Defendants the City of Cotati
("City") and John A. Dell'Osso, the Mayor of the City during the time in question, under 42
U.S.C. § 1983 for violations of their civil rights under the First Amendment's Freedom of Speech
Clause, Fourteenth Amendment's Equal Protection Clause, and the Americans with Disabilities
Act (ADA).

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28 Pending before the Court is the Defendants' motion to dismiss, strike, and for a more
definite statement of the first amended complaint (FAC) pursuant to Federal Rules of Civil
Procedure 12(b)(6), 12(e), and 12(f). *See* Docket No. 26 ("Second Mot. to Dismiss"). For the
following reasons, the Court **GRANTS in part** and **DENIES in part** Defendants' motion.

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I. BACKGROUND

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A. Factual Background

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Plaintiffs' claims relate to three separate incidents that occurred at public Cotati City
Council meetings held on January 8, January 22, and March 27, 2019. The constitutional claims
relate to the January meetings, during which Ms. Alderman was not allowed to read a statement
from Mr. Barich into the record. The ADA claim relates to the March meeting, where Mr. Barich

1 was unable to participate because the electronic hearing-assist device provided by the City failed.

2 The Plaintiffs' FAC alleges as follows. Mr. Barich and Ms. Alderman are frequent
3 attendees and speakers at Cotati City Council meetings. Docket No. 22 (FAC) ¶ 20. Mr. Barich, a
4 former City Council member, often disagrees with the policies advanced by the City Council and
5 over the years has engaged in "spirited debate with several council members." *Id.* Mr. Barich has
6 been called both a "gadfly" and a "watchdog" by the local press. *Id.*

7 On January 8, 2019, Mayor Dell'Osso presided over a regularly scheduled City Council
8 meeting. *Id.* ¶ 26. Mr. Barich, who was out of town and wished to be heard at the meeting,
9 appointed Ms. Alderman as his "attorney-in-fact" to read a written statement into the record. *Id.* ¶
10 27. During the meeting's public comment period, Ms. Alderman was not allowed to speak on
11 behalf of Mr. Barich or to read his statement into the record. *Id.* ¶ 28. However, Mayor Dell'Osso
12 accepted Mr. Barich's written statement for inclusion into the meeting's written record. *Id.*

13 On January 22, 2019, Mayor Dell'Osso presided over a regularly scheduled City Council
14 meeting. *Id.* ¶ 29. Mr. Barich again appointed Ms. Alderman as his "attorney-in-fact" to present
15 his testimony at the meeting. *Id.* ¶ 30. This time, Ms. Alderman filled out a speaker card for Mr.
16 Barich. *Id.* When his name was called, Ms. Alderman presented herself and a notarized copy of a
17 power of attorney granting her the authority to speak on Mr. Barich's behalf. *Id.* ¶ 30–31. Mayor
18 Dell'Osso asked for the advice of the City Attorney, who stated that the City's rules do not allow
19 for speakers to present a power of attorney and comment for someone else. *Id.* ¶ 31. In response,
20 Ms. Alderman told Mayor Dell'Osso and the City Attorney that they were violating Mr. Barich's
21 civil rights and that they should reconsider their decision not to let her read his statement into the
22 record. *Id.* at 33. Mayor Dell'Osso did not allow Ms. Alderman to read the statement into the
23 record. *Id.*

24 Plaintiffs assert that, to their knowledge, the City's rules prohibiting speakers from
25 presenting a power of attorney to speak on behalf of someone else "have never been enforced with
26 regard to anyone except Barich." *Id.* ¶ 31. *Id.* Plaintiffs also allege—as they did in their initial
27 complaint—that "[m]embers of the public who cannot attend City Council meetings in person are
28 *routinely* allowed to have representatives speak for them and to have their written statements read

United States District Court
Northern District of California

1 into the record during the public comment period.” *Id.* ¶ 14, 18; *see also* Docket No. 1 (“Compl.”)
2 ¶ 14. The FAC adds the following thirteen (13) “examples of meetings at which persons spoke for
3 others during the open comment period.”

4 03/10/10 Bob Haroch of Beyers-Costin for Colvin Group, seeking
5 development applications approvals;
6 08/25/2015 Andrew Alderman for Laurie Alderman (Plaintiff);
7 08/25/2015 Mr. Scott, Attorney for the Stanleys;
8 10/27/2015 Mr. Scott for the Stanleys;
9 10/26/2016 Neil Randolph & Guy Chambers of Colvin Group;
10 03/28/2017 Neil Randolph of Colvin Group & Dave Brown of
11 Adobe Associates;
12 05/09/2017 Dalene Whitcock for Colvin Group;
13 06/13/2017 Robin Miller of 116 Investors, LLC;
14 06/27/2017 Aksel Dregelid of David Taussig and Associates; Guy
15 Chamber for Colvin Group;
16 09/12/2017 Nathan Perez for David Taussig and Associates;
17 06/12/2018 Nick Caston with Kaya Management & Alta Supply;
18 Angelo Bertam with Eagle Eye, LLC; Craig Enyart, Representative
19 for 7950 Redwood Dr.;
20 08/21/2018 Neil Randolph for Colvin Group;
21 09/10/19 Michael Ceremello (who did not identify himself before
22 speaking) for Ourania Riddle, a resident of Dixon, regarding the
23 choice to elect or appoint the City Clerk and City Treasurer.

24 *Id.* ¶ 19. Many of the examples in this paragraph involve individuals speaking on behalf of
25 corporations or other entities, not on behalf of other individuals. Some do involve speech on
26 behalf of individuals. Moreover, the FAC alleges

27 during the public comment section of the Council meeting held on
28 September 10, 2019, just a few months *after* Dell’Osso denied
Alderman the right to read Barich’s statements into the record,
Dell’Osso allowed an attendee, Michael Ceremello, to read a
prepared statement of Ourania Riddle, who was not at the Council
meeting. Mr. Ceremello was able to read the statement from Ms.
Riddle regarding the election of a City Clerk and City Treasurer
versus appointing these positions, an issue that was not before the
Council. Dell’Osso did not raise the issue of whether Mr. Ceremello

1 was allowed to read the statement as he had done with Alderman at
2 the January meetings.

3 *Id.* ¶ 50 (emphasis added). Therefore, according to the FAC, allowing Mr. Ceremello to speak on
4 behalf of Ms. Riddle but not Ms. Alderman to speak on behalf of Mr. Barich constitutes “disparate
5 treatment.” *Id.* ¶ 51.¹

6 On March 27, 2019,² the City held a special meeting of the City Council. *Id.* ¶ 34. The
7 meeting was held in the community room at the Cotati police station rather than the City Council
8 chambers. *Id.* Mr. Barich, who suffers from progressive hearing loss and tinnitus, often requires
9 an electronic hearing-assist device at City Council meetings, which the City provides. *Id.* ¶ 21. A
10 week before the special meeting, Mr. Barich requested an electronic hearing-assist device for his
11 use at the meeting. *Id.* ¶ 35. The Cotati City Clerk assured Mr. Barich that he would be provided
12 with a hearing-assist device for the special meeting. *Id.*

13 As promised, the City Clerk provided Mr. Barich an electronic hearing-assist device at the
14 outset of the meeting. *Id.* ¶ 36. However, the device did not function inside the police station’s
15 community room. *Id.* The clerk gave Mr. Barich a second device that also did not function. *Id.*
16 According to the FAC, “[i]t is undisputed that the City’s hearing-assist devices could *never* work
17 in the community room, as they had to be connected to the public address system in the council
18 chambers next door in order to function.” *Id.* (emphasis added). In fact, the City Attorney
19 confirmed as much to Plaintiffs’ counsel via email. *Id.* ¶ 43. Plaintiffs therefore contend that no
20 public-address system was used at the special meeting because the community room did not have
21 one. *Id.* ¶ 39. According to Mr. Barich, “City Clerk Berges and City Planner Harries
22 acknowledged to Barich *before* the meeting that the hearing-assist devices were not working.
23 Barich asked that the Council be informed of the problem, but the meeting continued.” *Id.* ¶ 40
24 (emphasis added). As a result, Mr. Barich alleges that he was “relegated” to the side of the room
25 with some of the City Council members facing away from him, making it “impossible” for him to

26 _____
27 ¹ The FAC attaches portions of the transcripts for the January 8, January 22, and September 10,
28 2019 City Council meetings. See Docket Nos. 22-1 (FAC, Ex. A), 22-2 (FAC, Ex. B), and 22-3
(FAC, Ex. C).

² The FAC also attaches a portion of the transcript for the March 27, 2019 meeting. See Docket
No. 22-4 (FAC, Ex. D.).

1 follow along and participate in the discussion. *Id.* ¶ 37–39.

2 During the special meeting’s public comment period, Mr. Barich reminded the City
3 Council of his hearing disability, informed them that the council was not accommodating his
4 disability, and requested that the meeting be moved to the nearby council chambers where his
5 hearing disability could be accommodated through the use of the public-address system. *Id.* ¶ 41.
6 Mayor Dell’Osso denied Mr. Barich’s request and suggested that he raise his hand and interrupt
7 the meeting every time he was having trouble hearing the discussion. *Id.* ¶ 42. Mr. Barich replied
8 to Mayor Dell’Osso that this was unreasonable. *Id.* Mayor Dell’Osso answered that Mr. Barich
9 could either stay under the circumstances or leave. *Id.* Mr. Barich, unable to meaningfully
10 participate, left the meeting. *Id.* ¶ 43.

11 Based on these facts, Plaintiffs allege the City is taking advantage of Mr. Barich’s
12 disability to prevent him from participating in City Council proceedings in the community room,
13 where the provided electronic hearing-assist devices do not work because of the lack of a public
14 address system, thus denying him his right to full participation in the City Council’s deliberations.
15 *Id.* ¶ 21. The FAC admits that the City has purchased “a ‘personal sound amplifier’ that may be
16 available for Barich to use at City Council meetings,” but contends nonetheless that “there is no
17 guarantee that this device will be available for him to use in the future.” *Id.* ¶ 98.

18 Included in the Plaintiffs’ complaint are allegations related to three other incidents that are
19 not directly at issue but are included to provide “historical context” for the City’s conduct on the
20 dates in question and to show “discriminatory intent.” *See* Docket No. 30 (“Opp’n”) at 2. Mr.
21 Barich previously filed a civil rights action against the City and the City’s Chief of Police, *see*
22 *Barich v. Cotati and Michael Parish*, No. 3:15-CV-00350 VC (N.D. Cal. filed Jan. 24, 2015),
23 related to an incident in 2014 where the City’s Police Chief allegedly threatened to arrest Mr.
24 Barich for exercising his First Amendment rights. FAC ¶ 22. The case settled in 2015, with the
25 City paying Mr. Barich \$50,000. *Id.* According to Plaintiffs, Judge Chhabria, who presided over
26 that case, said he was shocked at the City’s and its counsel’s attitude toward the First Amendment.
27 *Id.* The Court declined to order an injunction against the City but allegedly warned that further
28 violation of Mr. Barich’s First Amendment rights would result in harsh consequences for the

1 City.³ *Id.* In 2007, Plaintiffs allege John Moore, the husband of former Cotati Mayor Lisa Moore,
 2 said, “Barich, I’m going run you out of town!” at a City Council meeting. *Id.* ¶ 23. An argument
 3 followed during which then Mayor, Pat Gilardi, told Mr. Moore and Mr. Barich to “knock it off or
 4 take it outside.” *Id.* In 2017, Mr. Moore, now a City Council member, asked Mr. Barich, “are you
 5 still a grower?” implying that Mr. Barich grew cannabis. *Id.* ¶ 25. On a second occasion, Mr.
 6 Moore called Mr. Barich a “money launderer” at a City Council meeting. *Id.* Mr. Barich denies
 7 both accusations. *Id.* Mr. Moore was duly appointed the Mayor of Cotati on December 8, 2020,
 8 replacing Mayor Dell’Osso. *Id.*

9 Based on, *inter alia*, the above allegations, Plaintiffs raise five (5) causes of action:

- 10 (1) violation of Mr. Barich’s right to equal protection under the Fourteenth
 Amendment against Mayor Dell’Osso (Claim 1);
- 11 (2) violation of Ms. Alderman’s freedom of speech rights under the First Amendment
 at the January 8 and January 22 meetings against Mayor Dell’Osso (Claim 2);
- 12 (3) violation of Ms. Alderman’s right to equal protection under the Fourth Amendment
 against Mayor Dell’Osso (Claim 3);
- 13 (4) unconstitutional policy, custom, or practice in violation of § 1983 pursuant to
 Monell v. Department of Social Services, 436 U.S. 658 (1978), against the City (Claim
 4) (the “*Monell Claim*”); and
- 14 (5) violation of Mr. Barich’s rights under the ADA, 42 U.S.C. §§ 12101–12213,
 against the City (Claim 5).

21 B. Procedural Background

22 Mr. Barich timely filed three separate claims under California’s Government Tort Claims
 23 Act, Cal. Gov. Code §§ 810–998.3, with the City of Cotati on April 16, 2019. *Id.* ¶ 9–11. The
 24

25 ³ In reference to the previous federal lawsuit, Plaintiffs provide a case number but do not cite any
 26 court documents. The Court reviewed the Docket and it does appear Judge Chhabria found that
 27 Mr. Barich’s First Amendment rights were violated when the Chief of Police threatened to arrest
 28 Mr. Barich if he was recording their conversation. *See Barich v. City of Cotati*, No. 3:15-CV-
 00350-VC, Docket No. 52 (Order Granting Mr. Barich’s Mot. for Partial Summ. J. and Den.
 Defs.’ Cross-Mot. for Summ. J.) 1:26–27 (“From these undisputed facts, it is clear that Chief
 Parish violated Mr. Barich’s First Amendment rights.”). The Court did not see any warning from
 Judge Chhabria in the record.

1 City's insurance carrier rejected all three claims by letter dated June 3, 2019. *Id.* ¶ 11. The letter
2 allegedly states that the claims were "rejected by operation of law." *Id.* Mr. Barich filed a fourth
3 supplemental claim related to the March 27, 2019 incident, specifically referencing the ADA, on
4 July 31, 2019. *Id.* On August 6, 2019, the City's insurer sent another rejection letter to Mr.
5 Barich, indicating that the fourth claim was also rejected by operation of law. *Id.*

6 In addition, on July 17, 2019, within the six-month statute of limitations period, Mr. Barich
7 filed an ADA complaint with the U.S. Department of Justice, Civil Rights Division, Disability
8 Rights Section, regarding the March 27 incident. *Id.* ¶ 12. The Disability Rights Section elected
9 not to take any action on Mr. Barich's complaint, allegedly for lack of resources, on or about
10 November 1, 2019. *Id.*

11 Plaintiffs filed the initial complaint with this Court on January 5, 2021. *See generally, id.*
12 On February 12, 2021, Defendants filed their first motion to dismiss, *see* Docket No. 10 ("First
13 Mot. to Dismiss"), which the Court granted with leave to amend on March 30, 2021, *see* Docket
14 No. 21 ("First Mot. to Dismiss Order"). Plaintiffs filed their FAC on April 23, 2021. *See* FAC.

15 On May 14, 2021, Defendants filed the pending motion to dismiss, strike, and for a more
16 definite statement along with a request for judicial notice. *See* Second Mot. to Dismiss; Docket
17 No. 27 (Defs.' Req. for Judicial Notice ("Defs.' RJDN")). Plaintiffs filed an opposition to the
18 motion along with their own request for judicial notice. *See* Docket Nos. 30 ("Opp'n"), 31 (Pls.'
19 Req. for Judicial Notice ("Pls.' RJDN").

20 II. LEGAL STANDARDS

21 A. Request for Judicial Notice

22 The Court may take judicial notice of matters that are either "generally known within the
23 trial court's territorial jurisdiction" or "can be accurately and readily determined from sources
24 whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). However, to the extent
25 any facts in documents subject to judicial notice are subject to reasonable dispute, the Court will
26 not take judicial notice of those facts. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir.
27 2001) ("A court may take judicial notice of 'matters of public record' . . . [b]ut a court may not
28 take judicial notice of a fact that is 'subject to reasonable dispute.'") (first quoting *MGIC Indem.*

1 *Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir.1986); then quoting Fed. R. Evid. 201(b)),
2 *overruled on other grounds by Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

3 B. Motion to Dismiss

4 Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include “a short and plain
5 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A
6 complaint that fails to meet this standard may be dismissed pursuant to Rule 12(b)(6). *See* Fed. R.
7 Civ. P. 12(b)(6). To overcome a Rule 12(b)(6) motion to dismiss after the Supreme Court’s
8 decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corporation v. Twombly*,
9 550 U.S. 544 (2007), a plaintiff’s “factual allegations [in the complaint] ‘must . . . suggest that the
10 claim has at least a plausible chance of success.’” *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th
11 Cir. 2014) (quoting *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1107 (9th Cir. 2013)).
12 The court “accept[s] factual allegations in the complaint as true and construe[s] the pleadings in
13 the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*,
14 519 F.3d 1025, 1031 (9th Cir. 2008). But “allegations in a complaint . . . may not simply recite
15 the elements of a cause of action [and] must contain sufficient allegations of underlying facts to
16 give fair notice and to enable the opposing party to defend itself effectively.” *Levitt*, 765 F.3d at
17 1135 (quoting *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir.
18 2014)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the
19 court to draw the reasonable inference that the Defendant is liable for the misconduct alleged.”
20 *Iqbal*, 556 U.S. at 678. “The plausibility standard is not akin to a ‘probability requirement,’ but it
21 asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting
22 *Twombly*, 550 U.S. at 556).

23 C. Motion to Strike

24 Before responding to a pleading, a party may move to strike from a pleading any
25 “redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). The essential
26 function of a Rule 12(f) motion is to “avoid the expenditure of time and money that must arise
27 from litigating spurious issues by dispensing with those issues prior to the trial.” *Wang v. OCZ*
28 *Tech. Grp., Inc.*, 276 F.R.D. 618, 624 (N.D. Cal. Oct. 14, 2011) (quoting *Whittlestone, Inc. v.*

1 *Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010)). Motions to strike are generally disfavored.
2 See *Shaterian v. Wells Fargo Bank, N.A.*, 829 F. Supp. 2d 873, 879 (N.D. Cal. 2011); *Platte*
3 *Anchor Bolt, Inc. v. IHI, Inc.*, 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004). A motion to strike
4 should only be granted if the matter sought to be stricken clearly has no possible bearing on the
5 subject matter of the litigation. See *Colaprico v. Sun Microsystems, Inc.*, 758 F. Supp. 1335, 1339
6 (N.D. Cal. 1991); *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other*
7 *grounds*, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) (“‘Immaterial matter’ is that which has no
8 essential or important relationship to the claim for relief or the defenses being pleaded.”).
9 Statements that do not pertain to, and are not necessary to resolve, the issues in question are
10 impertinent. *Id.* If there is any doubt whether the portion to be stricken might bear on an issue in
11 the litigation, the court should deny the motion to strike. *Platte Anchor Bolt*, 352 F. Supp. 2d at
12 1057. Just as with a motion to dismiss, the court should view the pleading sought to be struck in
13 the light most favorable to the nonmoving party. *Id.*

14 **III. REQUESTS FOR JUDICIAL NOTICE**

15 Defendants request the Court to take judicial notice pursuant to Federal Rule of Evidence
16 201 of the following materials:

- 17 (1) the official video and minutes of the January 8 and January 22, 2019 City Council
18 meetings, Defs.’ RJD ¶¶ 1–2;
- 19 (2) the City Council’s Policy 2017-02 (the “Policy”), *id.* ¶ 3;
- 20 (3) a body camera video of the March 27, 2019 City Council meeting taken by Mr.
21 Barich and posted on YouTube, *id.* ¶ 4; and
- 22 (4) the official video and minutes of the twelve meetings during which the FAC alleges
23 Mr. Del Osso allowed individuals to read statements on behalf of others; *id.* ¶¶ 5–16.

24 Plaintiffs do not oppose Defendants’ request for judicial notice. Instead, they file their
25 own request asking the Court to take judicial notice of the City Council’s Rules of Conduct (the
26 “Rules”). See Pls. RJD ¶ 1.

27 Federal Rule of Evidence 201 allows a court to take judicial notice of facts that are “not
28 subject to reasonable dispute because they: (1) are generally known within the trial court’s

1 territorial jurisdiction; or (2) can be accurately and readily determined from sources whose
2 accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)

3 First, the Court may take judicial notice of the video and minutes of the City Council
4 meetings because they are matters of public record. *See Lee*, 250 F.3d at 690 (courts may “take
5 judicial notice of undisputed matters of public record,” but generally may not take “judicial notice
6 of disputed facts stated in public record”); *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007)
7 (court took notice of prior lawsuits but refused to take notice of facts from plaintiff’s deposition
8 because “the accuracy of the deposition excerpts . . . could be subject to reasonable dispute”).
9 Courts in this district have taken judicial notice of similar video recordings and minutes of public
10 meetings *See, e.g., Bey v. City of Oakland*, No. 14-CV-01626-JSC, 2018 WL 1536649, at *2, n.1
11 (N.D. Cal. Mar. 29, 2018) (taking judicial notice of a video recording of an Oakland City Council
12 meeting); *Jonna Corp. v. City of Sunnyvale*, No. 17-CV-00956-LHK, 2017 WL 2617983, at *4
13 (N.D. Cal. June 16, 2017) (taking judicial notice of minutes from Sunnyvale City Council public
14 hearings); *Henneberry v. City of Newark*, No. 18-CV-01905-JCS, 2018 WL 3344543, at *6–7
15 (N.D. Cal. July 9, 2018) (taking judicial notice of municipal code provisions that outline when and
16 how members of the public can address Newark City Council).

17 Importantly, the Court can take judicial notice of the existence of these records, but not for
18 the truth of the statements within them. *See Lee*, 250 F.3d at 689 (“A court may take judicial
19 notice of ‘matters of public record’ . . . [b]ut a court may not take judicial notice of a fact that is
20 ‘subject to reasonable dispute.’” (first quoting *MGIC Indem. Corp.*, 803 F.2d at 504; then quoting
21 Fed. R. Evid. 201(b))).

22 Here, Defendants have only requested the Court take notice of the fact that Ms. Alderman
23 spoke on her own behalf at both City Council meetings, not for the truth of her statements. The
24 Court does not need to weigh the contents of the video to take notice of the fact that Ms. Alderman
25 spoke at the City Council meetings. Even if the Court did not take notice of the videos, the fact
26 that Ms. Alderman spoke at both City Council meetings is also represented in the meetings’
27 minutes and in the transcripts attached to the FAC.

28 Second, the Court can also take judicial notice without further authentication of the City

1 Council's Policy and Rules because they are public records available on government websites, and
2 if authentication is necessary, the City Clerk can testify to the authenticity of these documents.
3 Defendants do not challenge authenticity. *See, e.g., Santa Monica Food Not Bombs v. City of*
4 *Santa Monica*, 450 F.3d 1022, 1025 (9th Cir. 2006) (affirming district court's grant of request for
5 judicial notice of documents on file with the City Clerk of the City of Santa Monica and those
6 accessible on Santa Monica's official website); *Gerristen v. Warner Bros. Ent. Inc.*, 112 F. Supp.
7 3d 1011, 1033 (C.D. Cal. 2015) ("Under Rule 201, the court can take judicial notice of '[p]ublic
8 records and government documents available from reliable sources on the Internet, such as
9 websites run by governmental agencies.'" (quoting *Hansen Beverage Co. v. Innovation Ventures*,
10 LLC, No. 08-CV-1166-IEG POR, 2009 WL 6597891 (S.D. Cal. Dec. 23, 2009)); *Michery v. Ford*
11 *Motor Co.*, 650 Fed. App'x 338, 342 n.2 (9th Cir. 2016) (affirming district court's grant of request
12 for judicial notice of the existence of documents available on a government website).

13 Third, and finally, the Court may take judicial notice of the body camera video Mr. Barich
14 uploaded to YouTube because it is "information posted on certain . . . webpages that [Plaintiffs]
15 referenced in the [FAC]." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).
16 Under the doctrine of incorporation by reference, it is proper for a court to consider materials or
17 documents whose contents are alleged in the complaint when their authenticity is not questioned.
18 See *In re Tesla, Inc. Secs. Litig.*, 477 F. Supp. 3d 903, 919 (N.D. Cal. 2020) (citing *Lee*, 250 F.3d
19 at 688 and *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007)). Here, Plaintiffs are
20 not questioning the authenticity of the body camera video footage Mr. Barich uploaded to
21 YouTube.

22 Accordingly, the Court **GRANTS** the parties' respective requests for judicial notice in full.

23 **IV. MOTIONS TO DISMISS OR CLARIFY**

24 A. **First Amendment and Equal Protection Claims (Claims 1 through 3)**

25 Plaintiffs challenge Mayor Dell'Osso's decision not to allow Ms. Alderman to read a
26 written statement from Mr. Barich into the record during the public comment period at two City
27 Council meetings in 2019. Plaintiffs assert First Amendment and equal protection claims. FAC. ¶
28 26–33. Plaintiffs allege Mayor Dell'Osso's decision was "based solely on the content, and the

1 source, of the testimony” and done “with the specific intent to deprive Alderman of her
2 constitutional rights.” *Id.* ¶¶ 56, 63. In support of their claims, Plaintiffs allege that they were
3 “intentionally treated differently from others similarly situated who were permitted to have their
4 statements read into the record.” *Id.* ¶¶ 49, 69.

5 The Court granted Defendants’ first motion to dismiss Plaintiffs’ First Amendment and
6 equal protection claims because

7 Plaintiffs do not allege any specific instances where Mayor
8 Dell’Osso (or his predecessors) allowed a *similarly situated*
9 *individual* to read a written statement into the record during a City
10 Council meeting. The assertion that this was done “routinely” is
conclusory. *See Compl.* ¶ 14. Absent non-conclusory allegations of
such disparate treatment, Plaintiffs fail to state claim for First
Amendment viewpoint discrimination or equal protection disparate
treatment.

12 First Mot. to Dismiss Order at 2 (emphasis added). To cure the deficiencies of their viewpoint
13 discrimination and disparate treatment theories, Plaintiffs add to their FAC thirteen (13)
14 examples—going back to 2010—of other individuals being allowed to speak on behalf of others at
15 Cotati City Council meetings. *See* FAC ¶ 19.

16 Defendants again move to dismiss Ms. Alderman’s First Amendment viewpoint
17 discrimination claim by contending that she “was, in fact, allowed to speak, but *chose* to speak on
18 some other topic.” Second Mot. at 14 (emphasis added). In other words, their argument is that
19 Ms. Alderman—unlike the speakers in the thirteen other instances referenced in paragraph 19—
20 “sought to speak *separately and additionally* on behalf of [Mr.] Barich.” Mot. at 15. But the
21 January meetings’ minutes and video, as well as the transcripts attached to the FAC, do not
22 establish that Ms. Alderman asked to speak “separately and additionally,” *i.e.*, twice, at either of
23 the City Council meetings. To the contrary, the transcript and video of the January 8 meeting
24 show only Ms. Alderman noting that she submitted Mr. Barich’s written statement for the record
25 and then proceeding to speak on her own behalf about the lack of services for homeless people in
26 Cotati. *See* FAC, Ex A; Defs.’ RJN ¶ 1. In fact, the transcript and video of the January 22
27 meeting shows Ms. Alderman complaining that the conversation about whether she would be
28 allowed to speak on behalf of Mr. Barich at the January 8 meeting was had “off camera.” *See*

1 FAC, Ex. B at 2–3 (“[Mr. Dell’Osso]: Because I thought we discussed this last meeting too? [Ms.
2 Alderman]: We discussed it off camera. We did not discuss it as a formal thing.”); Defs.’ RJN ¶ 2
3 (same). This suggests that, as the FAC plausibly alleges, Ms. Alderman had no other choice but to
4 submit Mr. Barich’s written statement and to speak on her own behalf at the January 8 meeting
5 *after* Mr. Dell’Osso refused to let her read Mr. Barich’s statement altogether. Similarly, the
6 transcript and video of the January 22 meeting shows Ms. Alderman asking to speak on behalf of
7 Mr. Barich at the onset of the public comment period. FAC, Ex. B; Defs.’ RJN ¶ 2. It is only
8 after she is denied that opportunity that she proceeds to speak on her own behalf. *Id.* There is
9 simply nothing in the record to suggest she wanted—let alone asked to—speak twice.

10 There is no support in the record, whatsoever, for Defendants’ contention that Ms.
11 Alderman was free to read Mr. Barich’s statement during her allotted time at either the January 8
12 or January 22 meetings. Quite the opposite, when Ms. Alderman got up to speak on behalf of Mr.
13 Barich at the January 22 meeting, the City Attorney broadly advised Mr. Dell’Osso that “[y]our
14 rules do not allow for speakers to present a power of attorney and comment for someone else. . . .
15 If there is a writing, it can certainly be entered into the record, and you can certainly see it, but it
16 doesn’t come under the public comment rules.” FAC, Ex. B at 3:16–25. At no point did the City
17 Attorney—or any other official, for that matter—clarify that this “rule” did not apply if Ms.
18 Alderman chose to read Mr. Barich’s statement during the time allotted to her. In fact,
19 Defendants’ contradict themselves because their argument to dismiss Plaintiffs’ *Monell* claim
20 (addressed more fully below) is precisely that Mr. Dell’Osso is not liable because he had no the
21 Rules did not give him any discretion to allow Ms. Alderman to read Mr. Barich’s statement
22 altogether.

23 Defendants also ask the Court to dispense of Plaintiffs’ equal protection claims by arguing
24 that Plaintiffs were not treated differently than the persons referenced in paragraph 19 because
25 those people were “appearing for corporate entities, not for individuals desiring to speak.” Mot. at
26 16. Defendants also try to distinguish the prior instances referenced in paragraph 19 by arguing
27 that none of those people were attempting to read someone else’s written statement at a City
28 Council meeting. *Id.* at 16–17. These are unavailing distinctions because paragraph 19 contains

1 several examples of individuals speaking on behalf of other individuals. *See* FAC ¶ 19. For
2 example, it alleges that Ms. Alderman’s husband spoke on her behalf at the August 25, 2015 City
3 Council meeting. *Id.* Similarly, a lawyer referred to as “Mr. Scott” allegedly spoke on behalf of
4 his clients, “the Stanleys,” at the August 25 and October 27, 2015 meetings. *Id.* Most
5 importantly, several months *after* Ms. Alderman was prevented from reading Mr. Barich’s
6 statements, Mayor Dell’Osso allowed a man named Michael Ceremello to read a statement from
7 another person named Rainer Riddle during the September 10, 2019 City Council meeting. *See id;*
8 FAC, Ex. C at 3–4; Defs.’ RJN ¶ 16.

9 In sum, Plaintiffs have cured the deficiencies in their initial complaint by adding non-
10 conclusory allegations of disparate treatment. Accordingly, the Court **DENIES** Defendants’
11 motion to dismiss Plaintiffs’ First Amendment and equal protection claims because Plaintiffs have
12 plausibly stated claims of viewpoint discrimination and disparate treatment. *See Giebel v.*
13 *Sylvester*, 244 F.3d 1182, 1188 (9th Cir. 2001) (viewpoint discrimination occurs “when the
14 government prohibits ‘speech by particular speakers,’ thereby suppressing a particular view about
15 a subject” (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)
16 (Brennan, J., dissenting))); *Rosenbaum v. City & Cnty. of San Francisco*, 484 F.3d 1142, 1153
17 (9th Cir. 2007) (“To establish a discriminatory effect . . . the claimant must show that similarly
18 situated individuals . . . were not prosecuted.” (quoting *United States v. Armstrong*, 517 U.S. 456,
19 465 (1996))).

20 B. Monell Claim (Claim 4)

21 The Court dismissed Plaintiffs’ *Monell* Claim in the initial complaint because Plaintiffs
22 had failed to plausibly plead an underlying constitutional violation. First Mot. to Dismiss Order at
23 2. Even if Plaintiffs had pled a constitutional violation, however, the Court noted their *Monell*
24 Claim failed because they did not “allege in non-conclusory terms that the City had a policy or
25 custom of violating individuals’ First Amendment and equal protection rights” or that “Mayor
26 Dell’Osso is the final policymaker for the City.” *Id.*

27 Plaintiffs’ amended complaint mostly adds conclusory allegations that the city has a
28 policy, custom, or practice of violating individuals’ First Amendment or equal protection rights at

1 the City Council meetings and that Mr. Dell’Osso is the final policy maker. *See e.g.*, FAC ¶ 63
2 (“Dell’Osso’s unlawful actions occurred as the result of an official policy or custom and were
3 done willfully, knowingly, and with the specific intent to deprive Alderman of her constitutional
4 rights.”); *id.* ¶ 81 (“Dell’Osso was a final policy maker and had final policymaking authority from
5 the City of Cotati concerning the wrongful acts alleged herein.”); *id.* ¶ 84 (“The City, by its
6 policy-making agents, servants, and employees, authorized, sanctioned and/or ratified Dell’Osso’s
7 wrongful acts; and/or failed to prevent or stop those acts; and/or allowed or encouraged those acts
8 to continue.”); *id.* ¶ 85 (“The acts complained of were carried out by Dell’Osso in his capacity as
9 Mayor under the customs, policies, usages, practices, procedures, and rules of the City.”); *id.* ¶ 87
10 (“The existence of these unlawful de facto policies and/or well-settled and widespread customs
11 and practices is known to, encouraged, and/or condoned by supervisory and policy-making
12 officials of the City.”); *id.* ¶ 102 (“In doing the acts alleged herein, which occurred as the result of
13 an official policy or custom, the City acted with malice and reckless indifference to Barich’s
14 constitutional rights.”). These threadbare allegations that merely track the elements of a *Monell*
15 claim are insufficient to plausibly allege *Monell* liability. *See Dougherty v. City of Covina*, 654
16 F.3d 892, 900 (9th Cir. 2011) (dismissing “*Monell* and supervisory liability claims [that] lack[ed]
17 any factual allegations that would separate them from the ‘formulaic recitation of a cause of
18 action’s elements’ deemed insufficient by *Twombly*” (quoting *Twombly*, 550 U.S. at 555)).

19 Plaintiffs’ opposition, however, was filed with a request for judicial notice of the City
20 Council’s Rules, which state that

21 The Mayor or Presiding Officer has authority and discretion to
22 preserve order at all Council meetings. This includes the authority
23 to remove any person that presents a physical threat to any other
24 person in the Council meeting, or for conduct that disrupts the
25 meeting to prevent the orderly prosecution of the City’s business.
26 The Presiding Officer also has the authority and discretion to
27 enforce these rules of the Council and to determine the order of
28 business. The Presiding Officer shall have the authority to prevent
the misuse of the legitimate form of motions, the abuse of privilege
of renewing certain motions, or the obstruction of the business of the
City Council. The Presiding Officer may preserve orderly business
by ruling such motions out of order. In so ruling, the Presiding
Officer shall be courteous and fair and shall presume that the
moving party is making the motion in good faith.

1 See Docket No. 31-1 (“City Council Rules”) at 4 (Section II.C.1). This citation to the City
2 Council’s Rules is enough to plausibly allege that Mr. Dell’Osso is the final decision maker
3 because he has final say as to who can speak during City Council meetings. *Cf. Ass’n for L.A.*
4 *Deputy Sheriffs v. Cnty. of Los Angeles*, 648 F.3d 986, 994 (9th Cir. 2011) (concluding that
5 “the final decisionmakers” were “in Debs’s case, the Commission, and in O’Donoghue’s case, the
6 County and the Sheriff” because they decided whether to reconsider Debs’s and O’Donoghue’s
7 suspensions); *Weiner v. San Diego Cnty.*, 210 F.3d 1025, 1028 (9th Cir. 2000) (“In this case, the
8 parties concede the district attorney is the final decision-maker in determining whether to proceed
9 with a criminal prosecution.”). As such, for purposes of § 1983, Mayor Dell’Osso is acting “under
10 color of [the City Council’s Rules]” and therefore on behalf of the City when he refused to let Ms.
11 Alderman speak. 42 U.S.C. § 1983.

12 Defendants argued in their papers and at oral argument that Mr. Dell’Osso was not the
13 “final *policy* maker” because he did not draft or enact the Rules, which he was required to enforce
14 and that supposedly do not allow for speakers to read other individual’s written statements. First,
15 *Monell* liability is not imposed on final *policy* makers, it is imposed on final “*decision* makers.”
16 See *Ass’n for L.A. Deputy Sheriffs*, 648 F.3d at 994; *Weiner*, 210 F.3d at 1028. Plaintiffs’
17 complaint is not that the Rules are facially unconstitutional, but that Mr. Dell’Osso’s inconsistent
18 application of the Rules constitutes disparate treatment. Therefore, he is the final “*decision*
19 maker” for purposes of deciding whether and how to apply the Rules to silence speakers during
20 the City Council’s meetings. Second, in any event, the “rule” Defendants’ counsel cited at oral
21 argument does not prohibit speakers from reading other individual’s written statements; it states
22 that “[s]peakers may not ‘yield’ a portion of their allotted time to others.” City Council Rules at
23 16 (Section IV.G.6). Ms. Alderman was not trying to “yield” her time to anyone, let alone Mr.
24 Barich, who was not even present at either of the January meetings.

25 Accordingly, the Court **DENIES** Defendants’ motion to dismiss Plaintiffs’ *Monell* Claim.

26 C. ADA Claim (Claim 5)

27 The Court previously held that Plaintiffs lacked standing to seek injunctive relief for Mr.
28 Barich’s alleged ADA violation because they “have not alleged the threat of any imminent future

1 harm.” First Mot. to Dismiss Order at 3; *see also See Midgett v. Tri-Cnty. Metro. Transp. Dist. of*
2 *Or.*, 254 F.3d 846, 850 (9th Cir. 2001) (“[O]ccasional problems do not, without more, establish a

3 violation of the ADA. At most, the evidence shows past violations of the ADA. It does not,

4 however, support an inference that Plaintiff faces a real and immediate threat of continued, future

5 violations of the ADA in the absence of injunctive relief.”). Plaintiffs unsuccessfully attempt to

6 cure this deficiency by adding an allegation that, “[a]lthough the City has since purchased a

7 ‘personal sound amplifier’ that may be available for Barich to use at City Council meetings, there

8 is no guarantee that this device will be available for him to use in the future.” FAC ¶ 98.

9 Similarly, the FAC admits that “holding future meetings in the City Council Chambers which has

10 a public address system would be an accommodation for Barich,” but that “the City has not stated

11 that it would do so.” *Id.* ¶ 100. These entirely speculative allegations are insufficient to create

12 standing to bring a claim for injunctive relief under the ADA.

13 Plaintiffs attach to their opposition a declaration from Robert B. Skye, an “expert” they
14 hired to inspect the community room and the hearing-assist device the City has put in place. *See*
15 Docket No. 32 (“Skye Decl.”); Opp’n at 7–8. Mr. Skye declares that the hearing assist device “is
16 not appropriate and will *never* provide an adequate accommodation in a typical meeting
17 environment where the listener is not in the immediate vicinity of the persons peaking.” *Id.* ¶ 4
18 (emphasis added). Even if that is true, there is no indication in the FAC or otherwise that the City
19 intends to use the community room for future City Council meetings. In fact, at oral argument
20 Defendants’ counsel represented that City Council meetings have been held in the community
21 room only five times in the last five years, that the City does not intend to use it again, and that if
22 it did, it would make every effort to accommodate Mr. Barich. Based on these representations and
23 the lack of any concrete evidence the violation will be repeated, particularly in view of this
24 Court’s ruling herein, the Court concludes the likelihood that City Council meetings will be held
25 in the community room is insufficiently substantial to support standing for injunctive relief at this
26 time. The Court would have to revisit this conclusion if the City decides to use the community
27 room again and Plaintiff is unable to use the hearing device, as such a circumstance would indicate
28 the Defendants’ deliberate indifference to his rights under the ADA.

1 The Court also dismissed Plaintiffs' claim for compensatory damages under the ADA
2 because they failed to allege that Defendants acted with "deliberate indifference." First mot. to
3 Dismiss Order at 4 (quoting *Duvall v. Cnty of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001)). The
4 Court concluded that "the failure of hearing aid devices given to Mr. Barich does not appear to
5 have been an intentional act designed to exclude him from participating." *Id.*

6 To show "deliberate indifference," a plaintiff must plausibly plead "both knowledge that a
7 harm to a federally protected right is substantially likely, and a failure to act upon that . . .
8 likelihood." *Updike v. Multnomah Cnty*, 870 F.3d 939, 950–51 (9th Cir. 2017) (quoting *Duvall*,
9 260 F.3d at 1139). "When the plaintiff has alerted the public entity to his need for
10 accommodation (or where the need for accommodation is obvious, or required by statute or
11 regulation), the public entity is on notice that an accommodation is required, and the plaintiff has
12 satisfied the first element of the deliberate indifference test." *Id.* To meet the second prong, the
13 entity's failure to act "must be a result of conduct that is more than negligent, and involves an
14 element of deliberateness." *Id.*; see also *Duvall*, 260 F.3d qt 1139 ("Because . . . events may be
15 attributable to bureaucratic slippage that constitutes negligence rather than deliberate action or
16 inaction, we have stated that deliberate indifference does not occur where a duty to act may simply
17 have been overlooked, or a complaint may reasonably have been deemed to result from events
18 taking their normal course."). In sum, "[a] public entity may not disregard the plight and distress
19 of a disabled individual." *Id.*

20 Plaintiffs' allegations in the FAC cure the deficiencies of the initial complaint and likely
21 satisfy both prongs of the deliberate indifference test. Regarding the first prong, the FAC
22 plausibly alleges that Mr. Barich alerted the City to his need for an accommodation before and
23 during the March 27 meeting. Compl. ¶ 35 ("A week before the special meeting, Barich went to
24 the Cotati City Clerk's office and requested that an electronic hearing-assist device be provided for
25 his use at the upcoming special meeting."); *id.* ¶ 41 ("Mr. Barich reminded the City Council of his
26 hearing disability, informed them that the council was not accommodating his disability"). It is
27 undisputed that Mr. Barich alerted the City of his need for an accommodation.

28 Regarding the second prong, the FAC plausibly alleges that Defendants *knew*—before the

1 March 27, 2019 meeting—that the hearing aids they offered Mr. Barich “could *never* work in the
2 community room” because “they had to be connected to the public address system in the council
3 chambers next door in order to function.” FAC ¶ 36 (emphasis added); *see also id.* ¶ 43
4 (“Attorney for the City of Cotati in this case has confirmed via e-mail with opposing counsel that
5 the hearing assist devices could never have worked inside the Police Station Community Room.”).
6 In fact, according to the FAC, the City Clerk and the City Planner “acknowledged to [Mr.] Barich
7 *before* the meeting that the hearing-assist devices were not working. [Mr.] Barich asked that the
8 Council be informed of the problem, but the meeting continued.” *Id.* ¶ 40 (emphasis added). The
9 FAC also alleges that Defendants

10 had ample time to replace the non-functioning hearing devices or
11 move the meeting next door. A notice could have been sent out,
12 posted on the City’s website, and/or posted on the door of the room
itself, notifying the public that the meeting was moved next door in
the Council chambers, where the City’s electronic hearing-assist
13 devices would work. None of this was done.

14 *Id.* ¶ 99.

15 These allegations are sufficient to plausibly allege that Defendants knew about the
16 problems with Mr. Barich’s hearing aids and nonetheless deliberately chose not to fix or mitigate
17 the problem. In *Updike*, for example, the plaintiff “repeatedly requested a TTD, which was
18 physically available at the jail, but was never provided such a device to assist making phone calls.”
19 870 F.3d at 955. The Ninth Circuit concluded that these allegations were sufficient “evidence that
20 the County denied him use of a TTD, creating a genuine issue of material fact on this issue. A
21 trier of fact could conclude that the County acted with deliberate indifference in denying direct
22 requests for this accommodation, which would permit Updike to use telephones, a service
23 routinely made available to non-deaf inmates.” *Id.* *See also id.* (“Although the district court
24 attributed this to an ‘unintentional oversight,’ Updike has introduced evidence that County jail
25 employees *were aware* of Updike’s disability, *yet ignored his repeated requests* to turn on closed
26 captioning.” (emphasis added)). In *Duval*, the Ninth Circuit similarly held that factual issues
27 precluded summary judgment on Duval’s claims for monetary damages under the ADA because,
28 “Duvall telephoned [an officer] to request videotext display, she failed to investigate whether such

1 display was available (despite already having witnessed a demonstration of that system in the
2 courthouse), and she deliberately made the decision, instead, to ‘accommodate’ his disability by
3 rescheduling the trial in Courtroom 269.” 260 F.3d at 1140. What is alleged here—as in *Updike*
4 and *Duvall*—cannot be fairly characterized as “an absence of effective communication and
5 coordination” between City employees or an “unintentional oversight”; it was deliberate
6 indifference. *Id.*

7 Finally, the Court cannot determine at the motion to dismiss stage whether Defendants
8 provided Mr. Barich a “reasonable” accommodation by suggesting that he “simply raise his hand
9 if he was having difficulty hearing.” Mot. at 20. In *Updike*—which is again instructive—the
10 district court dismissed Plaintiff’s ADA claim based on the State’s failure to provide an ASL
11 interpreter during Mr. Updike’s recognizance interview because the County argued “[the
12 interviewer] was able to communicate effectively with Updike through written English and . . .
13 through written notes.” *See id.* at 956. The Ninth Circuit reversed, holding that “[w]hether the
14 County’s accommodation was sufficient requires sifting through a number of facts . . . a
15 reasonable jury could conclude that written communication was not adequate to ensure that
16 Updike could communicate as effectively as non-hearing-impaired individuals or that the County
17 provided the appropriate accommodation.” *Id.* (citations omitted). In other words, whether a
18 purported accommodation was reasonable or appropriate is a question of fact not suitable for
19 determination on the pleadings. A trier of fact might reasonably conclude that asking someone
20 with a hearing impairment to raise their hand at a City Council meeting is not a reasonable
21 accommodation for his disability.

22 Accordingly, taking the allegations in the FAC as true, the Court **GRANTS** Defendants’
23 motion to dismiss Plaintiffs’ claim for injunctive relief but **DENIES** Defendants’ motion to
24 dismiss Plaintiffs’ claim for compensatory damages under the ADA.

25 D. Prayer for Relief

26 1. Exemplary or Punitive Damages

27 Defendants move to dismiss Plaintiff’s prayer for exemplary or punitive damages. *See*
28 MTD 21–22. The Court already ruled that exemplary or punitive damages are not available under

1 Title II of the ADA. *See* First Mot. to Dismiss Order at 3 (citing *Barnes v. Gorman*, 536 U.S. 181,
2 192 (2002)). Punitive damages are also unavailable under § 1983 for claims against a
3 municipality. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (“[W]e hold
4 that a municipality is immune from punitive damages under 42 U.S.C. § 1983”). Accordingly,
5 punitive damages are not available for the claims against the City.

6 Punitive damages are available against individual defendants—such as Mr. Dell’Osso—
7 under §1983 “when the defendant’s conduct is shown to be motivated by evil motive or intent, or
8 when it involves reckless or callous indifference to the federally protected rights of others.” *Smith*
9 *v. Wade*, 461 U.S. 30, 56 (1983); *Castro v. City of Los Angeles* 797 F.3d 654, 669 (9th Cir. 2015).
10 Here, the Plaintiffs allege “Dell’Osso acted with deliberate indifference to Ms. Alderman’s
11 constitutional rights.” Compl. ¶ 63. Plaintiffs have also plausibly pled First Amendment
12 viewpoint discrimination and equal protection disparate treatment claims. *See supra* Part V.A.
13 Therefore, depending on what showing they make after discovery at summary judgment or trial,
14 and assuming they prevail, Plaintiffs could convince a trier of fact to award them punitive
15 damages for these constitutional violations.

16 Accordingly, the Court **DENIES** Defendants’ motion to dismiss Plaintiffs’ prayer for
17 exemplary or punitive damages as it pertains to the alleged violation of their constitutional rights.

18 E. Injunctive Relief

19 Plaintiffs have not pled an ADA claim that is redressable through injunctive relief. *See*
20 *supra*, Part 5.C. As for Plaintiffs’ constitutional claims, “[t]he Supreme Court has repeatedly
21 cautioned that, absent a threat of immediate and irreparable harm, the federal courts should not
22 enjoin a state to conduct its business in a particular way.” *Hodgers-Durgin v. de la Vina*, 199 F.3d
23 1037, 1042 (9th Cir. 1999) (citing *O’Shea v. Littleton*, 414 U.S. 488 (1974); *Rizzo v. Goode*, 423
24 U.S. 362 (1976); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Lewis v. Casey*, 518 U.S. 343
25 (1996)). Plaintiffs have shown that Barich’s First Amendment rights were violated in 2014.
26 Compl. ¶ 22; *see also supra*, Part II(A) fn. 2. However, “[p]ast exposure to illegal conduct does
27 not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by
28 any continuing, present adverse effects.” *O’Shea*, 414 U.S. at 495–96. Plaintiffs have not brought

1 plausible claims of additional violations, and even if they had, Plaintiffs have not alleged that the
2 City has violated or attempted to restrict their rights since March 27, 2019. Additionally, the
3 Mayor who allegedly discriminated against the Plaintiffs has been replaced. *Compl.* ¶ 25.
4 Although the facts alleged show that Barich and the current Mayor, John Moore, have had
5 arguments in the past, nothing alleged amounts to a constitutional violation. *Id.* ¶ 23–25. Put
6 simply, Plaintiffs have not alleged facts that reasonably suggest they face a real or immediate
7 threat of substantial or irreparable injury that would warrant injunctive relief.

8 Accordingly, the Court **GRANTS** Defendants' motion to dismiss Plaintiffs' prayer for
9 injunctive relief.

10 **V. MOTION TO STRIKE**

11 Defendants move to strike paragraphs 22, 23, and 25 from the complaint because the
12 events described are past the statute of limitations and “too old to be the basis of a cause of action
13 in this litigation,” “have no logical relationship to any of the claims,” and are “asserted for the
14 improper purpose of attempting to disparage the City and others.” Second Mot. to Dismiss at 13–
15 14. Plaintiffs argue in their opposition motion that the events described in the paragraphs in
16 question show the City’s past mistreatment of Mr. Barich and provide “historical context for the
17 City’s conduct on the dates in question, including discriminatory intent.” Opp’n at 2.

18 Motions to strike are generally disfavored and should only be granted if it is clear that the
19 matter sought to be stricken has no possible bearing on the subject matter of the litigation.
20 *Colaprico*, 758 F. Supp. at 1339; *see also Shaterian*, 829 F. Supp. 2d at 879. Here, Plaintiffs have
21 alleged intentional discrimination and are seeking an injunction against the City. Past
22 disagreements between Plaintiffs and members of the City Council could be relevant to
23 Defendants’ motivations and to the likelihood of future harm. Defendants have therefore not
24 shown that the alleged facts have “no possible bearing on the subject matter of the litigation.”

25 Accordingly, the court **DENIES** Defendants' motion to strike.

26 ///

27 ///

28 ///

1 **VI. CONCLUSION**

2 For the foregoing reasons, the Court **GRANTS in part** and **DENIES in part** Defendants'
3 motion to dismiss or strike.

4 This order disposes of Docket No. 26.

5
6 **IT IS SO ORDERED.**

7
8 Dated: July 20, 2021

9
10 
11 EDWARD M. CHEN
12 United States District Judge